United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-6082

United States Court of Appeals

FOR THE SECOND CIRCUIT

Index No. 76 C 29

UNITED STATES OF AMERICA and FRANCIS T. BRADY, Special Agent of the Internal Revenue Service,
Petitioners,

—*v*—

B & E PAVING COMPANY and JOSEPH BARTONE, Partner in B & E PAVING COMPANY,
Respondent-Appellants.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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BRIEF OF RESPONDENTS - APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from an Order, issuing from the United States District Court, Eastern District of New York, the Honorable Jack B. Weinstein presiding, enforcing an Internal Revenue Summons, ordering Joseph Bartone to produce the 1972 records of B & E Paving Company, of which Bartone was a partner, (A20-A22), but holding that Bartone's oral testimony is within

the Fifth Amendment privilege against self-incrimination (A 100). Respondent-Appellant seeks to have the summons quashed in its entirety.

QUESTION PRESENTED

Whether the District Court Order enforcing the Internal Revenue Summons against Joseph Bartone should be reversed because B & E Paving's partnership papers are protected by the Fifth Amendment privilege against self-incrimination?

STATEMENT OF FACTS

In 1971 Joseph Bartone (Respondent-Appellant herein) and Henry Esposito entered into a partnership, B & E Paving Company (also a Respondent-Appellant herein) (A 113). The partners were the sole operators of the partnership (A-14). They maintained day to day supervision of its operations, were the only signatories on the partnership's checking account, and were familiar with the accounting and bookkeeping procedures of the partnership (A-14 - A-15). Partnership income and job orders were produced through the exclusive efforts of the partnership

(A-15). The partnership employed only a part-time bookkeeper (A-65), one outside salesman, and a small construction crew (A-73). On occassion, Bartone's former sister-in-law helped with the payroll (A-73). The partnership records were at all times kept at the homes of the partners (A-67).

The partnership was dissolved in 1972 (A-15). Upon the dissolution of B & E Paving Company, Respondent-Appellant Bartone assumed all outstanding debts and liabilities of the partnership (A-15; A-67 - A-69). In consideration of this assumption, Bartone obtained personal ownership, possession and control of all partnership books and records (A-15, A-68). There was no investigation of B & E Paving or Joseph Bartone in progress at that time.

It was not until more than two and one half years later, in August 1975, that Mr. Bartone first received the Internal Revenue Summons in question (A-6). In November, 1975 the Government filed a "Petition to Enforce the Internal Revenue Summons" (A-1 - A-4). An Order to show cause issued on January 9, 1976 from the District Court for the Eastern District of New York (A-9 - A-10) as to why the Summons should not be enforced. It was pursuant

to that Order that the hearings below were held. Judge Weinstein's Order issued from those hearings.

SUMMARY OF ARGUMENT

The District Court Order enforcing the Internal Revenue Summons (insofar as partnership papers are concerned) should be reversed because Respondent-Appellant Bartone is entitled under the Fifth Amendment privilege against self-incrimination to refuse to produce the documents sought. Partnership papers are protected under the Fifth Amendment if the partnership in question is not formal enough to constitute an entity separate and distinct from the partners so that partnership records would be held in a representative capacity. B & E Paving was of sufficient informality that the partnership papers were personal in nature, giving rise to an expectation of privacy, and therefore falling within the Fifth Amendment zone of privilege. Even should the Court find that there was no expectation of privacy while the partnership was in existence, such expectation arose upon dissolution of the partnership.

ARGUMENT

POINT I

THE DISTRICT COURT ORDER ENFORCING THE INTERNAL REVENUE SUMMONS SHOULD BE REVERSED BECAUSE RESPONDENT-APPELLANT BARTONE IS ENTITLED UNDER THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, TO REFUSE TO PRODUCE THE DOCUMENTS SOUGHT

A. PARTNERSHIP PAPERS ARE PROTECTED UNDER THE FIFTH AMENDMENT IF THE PARTNERSHIP IN QUESTION IS NOT FORMAL ENOUGH TO CONSTITUTE AN ENTITY SEPARATE AND DISTINCT FROM THE PARTNERS.

Fifth Amendment protection against self-incrimination can protect one from being compelled to produce evidence which may later be used against him in a criminal action. Boyd v U.S., 116 U.S. 616 (1886); Maness v. Meyers, 419 U.S. 449 (1975). "This constitutional protection must not be interpreted in a hostile or niggardly spirit." Ullmann v. U.S., 350 U.S. 422, 426. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the

privilege may impose. U.S. v. White, 322 U.S. 694, 698 (1944).

The Appellant-Respondent concedes there is also a countervailing trend in the law to limit Fifth Amendment protection so as not to encompass organizational records held in a representative capacity. See Wilson v. U.S., 221 U.S. 361 (1911) (a corporation's records are not privileged).

Partnerships sometimes fall within the Fifth Amendment "zone of privacy" (Griswold v. Connecticut, 381 U.S. 479 (1965)), and sometimes without. As the Supreme Court stated in Bellis v. U.S., 417 U.S. 85 (1974):

> "We think it is similarly clear that partnerships may .... represent organized institutional activity so as to preclude any claim of Fifth Amendment privilege with respect to the partnership financial records. 417 U.S. 85,93.

Whether the partnership records are protected by the Fifth Amendment turns on whether the partnership was of such a formal nature that it constituted an entity separate and apart from the partners -- the persons claiming the privilege. Bellis v. U.S., supra. When the partnership entity is separate, the papers

are held in a representative capacity. However, it is only when a group or association of persons is formal and impersonal in the scope of its membership that it cannot represent purely personal interests. In re Subpoena Duces Tecum, 81 F. Supp. 418 (N.D. Cal. 1948). In a partnership, the papers are open to a legally enforceable right of inspection by the members of the partnership. U.S. v. White, supra[1]. Therefore, if the partnership is extensive, there is no expectation of privacy, and consequently, no possible Fifth Amendment claim. Couch v. U.S., 409 U.S. 322 (1973). Conversely, as the Supreme Court recognized in Bellis v. U.S., supra, the partnership may be so informal that there is an expectation of privacy. This is especially true where there is a preexisting expectation of confidentiality.

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1. White maintains its vitality in that it was not overturned by Bellis. In fact, Bellis draws heavily on White for its supporting rationale.

B. B & E PAVING WAS OF SUFFICIENTLY INFORMAL NATURE THAT THE PARTNERSHIP PAPERS WERE PERSONAL IN NATURE--GIVING RISE TO AN EXPECTATION OF PRIVACY--FALLING WITHIN THE FIFTH AMENDMENT ZONE OF PRIVILEGE.

The test to determine if a partnership falls within the Fifth Amendment zone of privilege is not a mechanical one. U.S. v. Onassis, 125 F.Supp. 190 (D.C. D.C. 1954). Whether a partnership has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent purely private or personal interests is of necessity a factual inquiry. U.S. v. Silverstein, 314 F. 2nd 789 (2nd Cir) cert. den. 374 U.S. 807 (1963); In the Matter of Grand Jury Proceedings, 399 F. Supp. 668 (D. N. J. 1975). The focus of the inquiry is on the character and extent of the ownership group. U.S. v. Cogan, 257 F. Supp. 170 (S-D. N.Y. 1966).

Where, as here, the partners supervised all the day to day operations of the business (A-14, A-15) and only the partners could sign checks (A-14, A-15), there is sufficient informality of operations to give rise to an expectation of confidentiality

and, pursuant thereto, Fifth Amendment protection. U.S. v. Slutsky, 352 F. Supp. 1105 (S.D. N.Y. 1972), cited with approval in Bellis v. U.S., supra. There is even greater indicia of informality here than in Slutsky. In Slutsky, there were two other full-time employees who helped in the business and who could sign checks. Here, there were only the two partners to perform those functions (A-14 - A-15). In Slutsky, the business involved was a large resort hotel, the Nevele, employing hundreds of people. Here, the partnership was only a two-man operation, employing a small work crew (A-72). In Slutsky, the partners employed a full-time accountant and a full-time bookkeeper. Here, the partners employed only a part-time bookkeeper (A-65), who worked from original entries and records prepared by the partners. Considering that the Supreme Court in Bellis v. U.S., supra at 101 cited Slutsky as an example of a situation where there was sufficient informality to afford partnership papers Fifth Amendment protection, this court must afford Appellant-Respondent Bartone that same protection.

While it is true that Slutsky involved two brothers, that family relationship does not distinguish Slutsky from the instant case. See U.S. v Mahady and Mahady, 512 F. 2nd 521 (3rd Cir. 1975). Fifth Amendment privilege can be exercised when there is an expectation of privacy and confidentiality. That expectation can arise (as it has in this case) whether or not the partners are brothers. There is no precedent in law distinguishing sibling relationships, as there are, for example, spousal relationships. The exercise of a constitutional privilege does not depend upon the consanguinity of the individuals involved.

Partnership papers are always open to inspection by other partners. The more extensive the partnership, the more people have access to the papers, the less likely that confidentiality will be maintained. However, where there are, as here, only two partners, with a close confidential relationship, they have a right to expect that the partnership matters remain within the confines of their relationship. Slutsky v. U.S., supra. That

expectation can be present whether or not the two partners are brothers. Indeed, there is more proof that an expectation of privacy arose here then there was in the Slutsky case (see above).

While it is true that in Bellis v. U.S., supra, the Supreme Court found the partnership a sufficiently separate entity to deny Fifth Amendment protection to the partnership papers, the present case differs factually from Bellis in several respects.

In Bellis, the partnership records in the case were being held by the taxpayer in a representative capacity. They were subject to the inspection and accounting demands of the other partners over a period of 15 years. The records to be produced remained at the partnership office for three years after Bellis left the partnership. The partnership there in question consisted of several partners and the partnership's business was maintained, with the several indicia of institutional existence, after Bellis left the firm.

The partnership of B & E Paving Company was a two-man partnership of limited duration (A-14 - A-15). It was operated on a day-to-day basis by both partners who were intimately involved in all finiancial and business affairs of the partnership (A-14 - A-15). The records of the partnership were at all times

kept at the residence of either of the two partners (A-67). The partners maintained their principal office nowhere else. When the partnership dissolved, Appellant-Respondent, Joseph Bartone obtained full ownership of the records in order to liquidate the debts of the partnership which he had assumed as part of the dissolution and purchase of his former partner's interest (A-67 - A-69).

C. EVEN SHOULD THE COURT FIND THAT THERE WAS NO EXPECTATION OF PRIVACY WHILE THE PARTNERSHIP WAS IN EXISTENCE, SUCH EXPECTATION AROSE UPON DISSOLUTION OF THE PARTNERSHIP

Even if the Court should find that there was no expectation of privacy while the partnership was in existence, it is clear that such expectations arose upon dissolution of the partnership.

It is the law of the law of the State of New York that no suit in law or equity, including an action for an accounting, arises with respect to partnership transactions after an agreement for purchase by one partner of another partners interest. Steiner v. American Alcohol Co. Inc., 181 AD 309, 311, 168 N.Y. 739· Werring v. Selig, 271 N.Y.S. 483, 241 AD 67 (AD 1st Dept 1934) appeal denied 264 NY 688, 191 NE 628 affirmed 266 NY 566, 195 NE 203. Ir the instant case, Bartone bought out Esposito in 1972 and took sole possession of all partnership records (A-67 - A-69).

When jointly owned papers are conveyed from one joint owner to another, an Internal Revenue Summons served on the conveying owner cannot be enforced since he is not the owner of the papers. U.S. v. Klechner, 273 F. Supp. 251 (1967). The law therefore recognizes that jointly owned books and records can, by legal conveyance, be the sole personal property of one person to the exclusion of all others.

Joseph Bartone, therefore, had the control over contents, location and privacy of the records which are characteristic of a claim of privacy and confidentiality.

CONCLUSION

WHEREFORE, Respondent-Appellant Bartone and B&E Paving Co respectfully requests this Court to reverse the Order of the District Court, deny the Government's motion to enforce the summons and grant such other and further relief as this Court may deem just and proper.

RESPECTFULLY SUBMITTED

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UNITED STATES COURT OF APPEALS
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Partner in B & E PAVING COMPANY,

Respondent-Appellants.

File No. 76-6082

CERTIFICATE OF SERVICE

I, Don B. Panush, an associate of the Firm of Bandler and Kass, attorneys for Respondent-Appellants, B & E Paving Co. and Joseph Bartone in the above-entitled cause, hereby certify that on the 23rd day of July, 1976, I served the attached "Appendix for Appellant" upon Scott P. Crampton, Esq., Assistant Attorney General, Tax Division, attorney for Petitioners-Appellees, by depositing three (3) copies in the United States mails, postpaid, addressed to him at Department of Justice, Washington, D.C. 20530, his last known address.

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v

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Partner in B & E PAVING COMPANY,

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I, Don B. Panush, an associate of the Firm of Bandler and Kass, attorneys for Respondent-Appellants, B & E Paving Co. and Joseph Bartone in the above-entitled cause, hereby certify that on the 23rd day of July, 1976, I served the attached "Brief for Appellant" upon Scott P. Crampton, Esq., Assistant Attorney General, Tax Division, attorney for Petitioners-Appellees, by depositing three (3) copies in the United States mails, postpaid, addressed to him at Department of Justice, Washington, D.C. 20530, his last known address.

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